85-221

NO

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

HERBERT O. JENSEN,

PETITIONER,

V.

MARGARET HECKLER, SECRETARY,
OF HEALTH AND HUMAN SERVICES,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

HERBERT O. JENSEN
BOX 1497 NDSP
BISMARCK, N.D. 58502
PRO SE

58pp

I

QUESTIONS PRESENTED FOR REVIEW

1.) Is Title 42 U.S.C. 402 (x) unconstitutional, as enacted, and as applied, because it is punitive in nature, and therefore violates Article I, Section 9, Clause 3, of the United States Constitution as a Bill of Attainder?

2.) Is Title 42 U.S.C. 402 (x) unconstitutional, as enacted, and as applied, because it is punitive in nature, for a past act, and therefore violates Article I, Section 9, Clause 3, of the United States Constitution as an Ex Post Facto Law?

3.) Is Title 42 U.S.C. 402 (x) unconstitutional, as enacted, and as

applied, because it violates Jensen's rights of due process, and equal pro - tection, pursuant to the 5th Amendment of the United States Constitution ?

4.) Is Title 42 U.S.C 402 (x) unconstitutional, as enacted, and as applied, because it violates the grand-father clause?

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Comes now the petitioner, Herbert O. Jensen, who respectfully requests that this Honorable Court issue a Writ of Certiorari to review the order of the United States Court of Appeals for the Eighth Circuit, dated July 3, 1985.

The petitioner respectfully requests that this Honorable Court give its most liberal consideration and interpretation to this inartful petition, by overlooking any defects in form or content, because it is a pro se petition done without benefit of legal counsel.

OPINION BELOW

A copy of the order of the United States Court of Appeals for the Eighth Circuit, dated July 3, 1985, is attached hereto as Appendix A.

JURISDICTION

This Court's jurisdiction is invoked under Title 28 U.S.C. 1254 (1).

STATUTORY PROVISIONS INVOLVED

The petitioner respectfully suggests that Titles 38 U.S.C 3113 (a)(1)and (d), 42 U.S.C 402 (x), Article 1, Section 9, Clause 3 of the United States Constitution, the 5th Amendment of the United States Constitution, and Chapters 12.1-32-01 (5), and 12.1-32-02 (1.)(c)(1) of the North Dakota Century Code, are relevant to this petition, and copies of said statutes, article, Constitutional Amendments, and North Dakota Century Code, are attached hereto as Appendix B, C, D, E, F, and G, respectively.

STATEMENT OF THE CASE

In 1974, after suffering two serious heart attacks, the petitioner, Herbert O. Jensen, a retired 20 year veteran of the United States Air Force, applied for, and began receiving, Social Security Disability benefits.

In 1977, Jensen was convicted of 2nd degree murder, and he was sentenced to serve 30 years in the North Dakota State Penitentiary, where he is still presently incarcerated.

In 1980, congress amended the Social security Act to prohibit any individual, in prison for a felony conviction, from receiving any monthly Social Security disability benefits during the period of incarceration. (Title 42 U.S.C. 423 (f))

In July 1981, Jensen was notified by the Social Security Administration that his monthly disability benefits were going to be suspended during the remainder of his incarceration, effective back to October 1980, pursuant to the new statute, Title 42 U.S.C. 423 (f), and that he was also being billed for overpayment by Social Security in the amount of almost $4,000.

Jensen did not challenge the suspension of his monthly disability benefits, or the billing for overpayment, in any type of administrative appeal to the Social Security Administration.

In October 1981, Jensen filed a civil action against the Secretary of the Social Security Administration, in the United States District Court for the District of North Dakota, claiming that, inter alia, the statute in question violated his

constitutional rights of due process, equal protection, ex post facto, and bill of attainder, and he sought declarative, injunctive, and compensatory relief.

In August 1982, the United States District Court for the District of North Dakota, dismissed Jensen's claims after finding that he had not exhausted his administrative remedies in the Social Security Administration, and that nothing had been shown as a basis for the court to exercise jurisdiction over the subject matter.

In September 1982, Jensen appealed the decision of the United States District Court to the United States Court of Appeals for the Eighth Circuit.

In April 1983, congress passed some amendments to the Social Security Act which struck down Title 42 U.S.C. 423 (f), and

added Title 42 U.S.C. 402 (x), which not only suspended the disability benefits of an incarcerated felon in prison, but also suspended the old age and survivor's benefits.

In July 1983, the United States Court of Appeals for the Eighth Circuit reversed and remanded the decision of the United States District Court for the District of North Dakota, by stating that because Jensen was acting pro se, the United States District Court should have construed his pleadings more liberally, and that jurisdiction did exist under Title 42 U.S.C. 405 (g), because Jensen's claim was collateral to his substantive rights to Social Security benefits.

In October 1984, on remand from the United States Court of Appeals for the Eighth Circuit, the U.S. District Court

for the District of North Dakota once again dismissed Jensen's claims by stating that he had not been denied any 5th Amendment rights of due process or equal protection, and that the statute in question was not an ex post facto law, or a bill of attainder.

In December 1984, Jensen again appealed to the United States Court of Appeals for the Eighth Circuit.

On July 3, 1985, the United States Court of Appeals for the Eighth Circuit affirmed the decision of the United States District Court for the District of North Dakota, by stating that Jensen's rights of due process and equal protection had not been violated, and that the statute in question was not an ex post facto law, nor a bill of attainder.

REASONS FOR GRANTING THE WRIT

I

Title 42 U.S.C. 402 (x) is unconstitutional, as enacted, and as applied, because it is punitive in nature, and therefore violates Article 1, Section 9, Clause 3, of the United States Constitution as a bill of attainder.

A bill of attainder is a legislative act, no matter what kind of form, that applies either to a named individual, or to an easily ascertainable group of individuals, in such a way as to inflict a punishment on them without benefit of a judicial trial, or without any kind of pronouncement of a conviction, or a judgement, in the ordinary sense of a judicial proceeding.

The passage of such a law is expressly forbidden by the United States Constitution.

Title 42 U.S.C. 402 (x) shows a congressional intent to impose an arbitrary and capricious punishment, and retribution, along with a deterrent for future conduct, upon a person, or a small group of persons, who are receiving Social Security disability benefits, and have been convicted of a felony and sent to prison.

The statute singles out, and punishes, not every person who has committed a crime, or every person who is collecting Social Security disability benefits, but only those people, from a small class of easily identified people, who have been convicted of a felony, and then sent to prison.

The punitive legislation adds an arbitrary additional punishment for a felony without any consideration for the type of crime, the seriousness of the crime, the nature of the offender, the

past record of the offender, or the length of the sentence.

Jensen has had a punishment inflicted upon him, without benefit of any kind of judicial trial, or pronouncement of any judgement or sentence, and without any appeals. This is a clear violation of Article 1, Section 9, Clause 3 of the United States Constitution as a bill of attainder.

II

Is Title 42 U.S.C 402 (x) unconstitutional, as enacted, and as applied, because it is punitive in nature, for a past act, and therefore violates Article 1, Section 9, Clause 3 of the United States Constitution as an ex post facto law?

An ex post facto law is the imposition of a legislative punishment, for a past act, that was not punishable at the time the act was committed, which increases, or imposes an additional punishment, over what was prescribed by law at the time of the offense, without benefit of any kind of judicial trial, or without any kind of judgement or sentence,and without any kind of an appeal.

In the instant case, Title 42 U.S.C. 402 (x) adds an additional punishment to Jensen's 30 year sentence, for a crime that was committed in 1974, which was over 6 years before the Social Security disability statute was enacted, and it inflicts a greater punishment upon Jensen, in a way that was not possible for him to be punished by the state when the actual judgement and sentence was

pronounced, by taking away his earned right of receiving Social Security disability benefits.

Jensen argues that he had a constitutional right to collect Social Security disability benefits, that had already been approved long before his sentence to prison, and that he has the same right to collect those benefits after his imprisonment, unless that right was specifically taken away from him by the terms of the state punishment for his crime, which was not the case.

This is a clear violation of Article 1, Section 9, Clause 3 of the United States Constitution as an ex post facto law.

III

Is Title 42 U.S.C. 402 (x) unconstitutional, as enacted, and as applied, because it violates Jensen's rights of due process and equal protection, pursuant to the 5th Amendment of the United States Constitution?

1.) Petitioner Jensen, through his lifelong contributions to the Social Security disability program, including his career as a 20 year veteran in the United States Air Force, has earned the right to participate in the program, and receive benefits for his disability.

The payments he had been receiving for six years, were suspended solely because he had been convicted of a felony and sent to prison, and not because of any change in his disability status.

Because Jensen's original 30 year sentence for a felony conviction was increased by the application of Title 42 U.S.C 402 (x), without benefit of any trial, conviction, or appeal, and because the statute relates solely to an easily identifiable group of people, namely, those who are receiving Social Security disability benefits as a convicted felon in prison, and not all people receiving Social Security disability benefits, his rights of due process and equal protection, pursuant to the 5th Amendment of the United States Constitution, have been seriously violated.

2.) Title 38 U.S.C. 3113 (d) suspends disability benefits to veterans who have been convicted of a felony and sent to prison, <u>after the date of the enactment of the law</u>, October 7, 1980,

and for any veteran incarcerated for a felony who applies for disability after that date. (emphasis mine)

However, any veteran convicted of a felony, and sent to prison before the date of October 7, 1980, and who is getting disability benefits before the conviction and imprisonment, will continue to receive the disability benefits as long as he is in prison, even though he might be convicted of the same crime as Jensen, on the same date as Jensen, and receive the same sentence as Jensen, and be sent to the same prison as Jensen, while Jensen will have his Social Security disability benefits suspended, pursuant to the new statute, 42 U.S.C. 402 (x).

Jensen argues that this difference in the two statutes violates his rights of due process and equal protection,

pursuant to the 5th Amendment of the United States Constitution, because it unlawfully discriminates against Jensen as a Social Security disability recipient, compared with a veterans disability benefit recipient, and that there is no rational basis for the difference in the two laws.

3.) All the employees working in the private sector of the economy, who pay into a private disability insurance fund, and end up in prison for a felony conviction, will not have his or her disability benefits suspended while in prison, even though Jensen would have his Social Security disability benefits suspended. This is another clear violation of Jensen's rights of due process and equal protection, because the new statute arbitrarily discriminates against

Social Security disability benefit recipients who are in prison for a felony conviction.

4.) All the employees of the Federal Government, who work in all the multitude of jobs, in all the branches of the Federal Government, including the congressmen who pass the laws, are all protected by a disability insurance program, which they pay into during their employment, pursuant to 5 U.S.C. 8101 et seq.

If one of these federal employees becomes disabled, he will be able to collect disability benefits from the Government insurance plan. If that same individual ends up in prison for a felony conviction, he will continue to receive the disability benefits all the time he is in prison. It is only people who are

collecting Social Security disability benefits who will have their benefits suspended if they end up in prison for a felony conviction.

In other words, a federal employee who was collecting federal disability benefits, and who committed the same crime as Jensen, on the same day as Jensen, and received the same sentence as Jensen, will be able to continue receiving benefits during the entire period of incarceration, whereas Jensen cannot collect his Social Security disability benefits, even though the two of them might be in the same prison, in cells right next to each other.

Jensen argues that 42 U.S.C. 402 (x) discriminates against him, as a Social Security disability recipient, in comparison to the federal employee who is getting

federal disability benefits. This is a clear violation of Jensen's rights of due process and equal protection, pursuant to the 5th Amendment of the United States Constitution.

5.) If Jensen, instead of ending up in prison, had ended up in a veteran's hospital, or a public health service hospital, or an alcohol treatment program, or a nursing home, or a mental hospital, or a hospice, he would still continue to collect his social security disability benefits. It is only because he ended up in prison, for a felony conviction, that his benefits were suspended. This is yet another clear indication of the arbitrary discrimination of 42 U.S.C. 402 (x), and shows the denial of Jensen's due process and equal protection rights.

6.) Jensen was sentenced to serve a prison sentence for a felony. As a result, he had his social security disability benefits suspended. However, those people who have committed a felony, and receive only probation, or a fine, will continue to receive their social security disability benefits. Title 42 U.S.C. 402 (x) is a clear discrimination against Jensen because he has been sent to prison, and not because he has committed a felony. This is a due process and equal protection violation of the 5th Amendment.

7.) Jensen was insured under Title 42 U.S.C. 417 (g) "Benefits in case of veterans" and was paying a monthly premium to the Federal Hospital Insurance Fund by premium deduction out of social security benefits. When his benefits were suspended, Jensen had to make other arrangements to pay the

Jensen's rights of due process and equal protection have been violated.

8.) Pursuant to North Dakota law, Chapters 12.1-32-01 (5), and 12.1-32-02 (1.)(c)(1) of the North Dakota Century Code, a person convicted of a Class A misdemeanor, which carries a maximum penalty of one year in prison, may be sent to the state correctional facility (prison), a county jail, or the state farm.

In other words, a person collecting social security disability benefits, who is convicted of a Class A misdemeanor, cannot have his disability benefits suspended, pursuant to 42 U.S.C. 402 (x), even though he is sent to the state prison, yet Jensen will have his benefits suspended. Even if the person goes to the county jail for the full year, he can't lose his disability benefits.

Jensen argues that Title 42 U.S.C. 402 (x) unlawfully discriminates against him, because he was convicted of a felony, and not because he was sent to prison. Both Jensen, and the other person convicted of a Class A misdemeanor, might end up in the same prison, but only Jensen would lose his disability benefits. This is a clear violation of Jensen's due process and equal protection rights.

9.) The argument might be presented, as noted in the opinion of the U.S. Court of Appeals for the 8th Circuit, dated July 3, 1985, that because an inmate's needs are being met in prison, especially those needs of food, clothing, shelter, and medical care, then there is no need to give that person any social security disability benefits.

However, this argument is based on a false assumption that an inmate's needs

are being met in an adequate manner while that person is in prison.

Jensen argues that this Honorable Court is aware of the fact that the majority of state prison systems in the United States have either been declared unconstitutional by the courts, or that they are under litigation for unconstitutional violations.

The living conditions in virtually every prison in the country fall far short of the adequate care for a civilized society that is required by the constitution. The congess has recognized this fact when it passed the "Civil Rights of Institutionalized Persons Act."

In addition, even Jensen is under present litigation in the United States District Court for the District of North Dakota, against the North Dakota State

Prison, for inadequate and unconstitutional prison conditions.

The following list is just some of the state prison systems that have been declared unconstitutional in recent years: Pugh v. Locke, 406 F. Supp. 318 (Alabama 1976), Finney v. Norby, 458 F. Supp. 720 (Arkansas 1978), Ramos v. Lamm, 26 Cr.L. 2380 (Colorado 1980), Anderson v. Redman, 429 F. Supp. 1105 (Delaware 1977), Costello v. Wainwright, 553 F. 2d 506 (Florida 1977), Williams v. Edwards, 547 F. 2d 1206 (Louisiana 1977), Johnson v. Levine, 450 F. Supp. 648 (Maryland 1978), Gates v. Collier, 501 F. 2d 1291 (Mississippi 1978), Burks v. Teasdale, 603 F. 2d 59 (missouri 1979), Laaman v. Helgemoe, 437 F. Supp. 269 (New Hampshire 1977), Chapman v. Rhodes, 434 F. Supp. 1007 (Ohio 1977), Battle v. Anderson, 564 F. 2d 388 (Oklahoma 1977),

Palmigiano v. Garrahy, 443 F. Supp. 956 (Rhode Island 1977), and just recently, in a sister state to North Dakcta, Cody v. Hillard, 599 F. Supp. 1024 (South Dakota 1984), and, in addition, there are numerous other states where litigation is now in progress regarding the unconstitutional prison conditions.

IV.

Is Title 42 U.S.C. 402 (x) unconstitutional, as enacted, and as applied, because it violates the grandfather clause?

Jensen argues that the sole function of the grandfather clause is to prevent the harsh and unfair operation of a statutory change which threatens to deprive an individual of a constitutional right which had already been approved prior to the change in the law,

In the instant case, Jensen had been approved to receive social security disability benefits for over six years prior to the enactment of Title 42 U.S.C. 423 (f) and 42 U.S.C 402 (x). When Jensen's benefits were suspended, his rights of due process and equal protection were violated because there is no grandfather clause included in the new statute.

CONCLUSION

The "Hiss Act", Title 5 U.S.C. 8312, was enacted in 1954 to prevent Algier Hiss from receiving a federal pension because of his crime. The "Act" had the effect of denying benefits to a great many of Government employees who were convicted of much less serious crimes, such as fraud, bribery, and embezzelment, and therefore,

the "Act" was amended in 1961 to restore benefits to those individuals.

The entire history of our legislature demonstrates that these types of laws enacted as "punishments" have been wrong.

The suspension of social security disability benefits to an incarcerated prison felon, because their basic needs are being met in prison, is inconsistent with the entire philosophy behind the original intent of the social security system.

Social security is not now, nor has it ever been, a system based on need. It is not a handout. It is not a charity. It is an earned right based on individual contributions to the system from work in the labor force.

The argument might be raised that convicted felons sent to prison lose the

right to vote, and to hold public office, so why can't they lose the right to their social security disability benefits?

However, this argument overlooks the fact that these rights to vote and hold office are not earned rights, but rights that we are born with, and that social security disability benefits are an earned right from years of hard work, and contributing to the system.

In Mathews v. Eldridge, 424 U.S. 319, 340-41, (1976), the United States Supreme Court noted that eligibility for social security disability benefits is not based upon financial need, and it is unrelated to the worker's income, or the support from many other sources, such as earnings of other family members, workmens compensation, tort claims awards, savings, private insurance, public or

private pensions, veteran's benefits, food stamps, public assistance, or the many other programs, both public and private, which contain provisions for disability payments affecting a substantial portion of the work force.

Therefore, based on all the foregoing statements and reasons presented in this petition and appendix, Jensen respectfully requests that this Honorable Court grant his petition for a Writ of Certiorari.

Dated this 3rd day of August 1985.

Herbert O. Jensen

Herbert O. Jensen
Box 1497 NDSP
Bismarck, N.D. 58502

Subscribed and sworn to before me on this 3rd day of August 1985.

Notary Public

My commission expires 1991

CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of the foregoing Petition for a Writ of Certiorari, with appendix, to the United States Court of Appeals for the 8th Circuit, were mailed on the 3rd day of August 1985, with postage prepaid, to Office of the Clerk, Supreme Court of the United States, Washington, D.C..20543, and to Jerome C. Kettleson, Ass't U.S. Attorney, P.O. Box 699, Bismarck, N.D. 58502.

Herbert O. Jensen

Herbert O. Jensen
Box 1497 NDSP
Bismarck, N.D. 58502

Subscribed and sworn to before me on this 3rd day of August 1985.

My commission expires

Notary Public

1991

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 84-2454

Herbert O. Jensen, Appellant, v. Margaret Heckler, Secretary, of Health and Human Services, Respondent.	)	Appeal from the United States District Court for the District of North Dakota.

Submitted: May 2, 1985

Filed: July 3, 1985

Before ROSS, ARNOLD, and BOWMAN, Circuit Judges.

PER CURIAM.

Herbert O. Jensen appeals pro se from an order of the district court[1] granting summary judgement in favor of the Secretary of Health and Human Services (Secretary). On remand from this court, Jensen v. Schweiker, 709 F.2d 1227 (8th Cir. 1983), the district court found that 42 U.S.C. 402 (x)(1) was constitutional. The statute suspends payment of social security benefits to incarcerated felons who are not involved in an approved rehabilitation program.[2]

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[1]The Honorable Bruce Van Sickle, United States District Judge for the District of North Dakota.

[2]Section 42 U.S.C. 402 (x)(1) provides:

Notwithstanding any other provision of this subchapter, no monthly benefits shall be paid under this

For the reasons discussed below, we affirm.

I. BACKGROUND

The facts of this case are simple and uncontroverted. In 1974, after two heart attacks, Jensen began receiving social security disability benefits. In 1977, he was convicted of second degree murder, and is currently serving a twenty year prison sentence. In 1980 Congress amended the Social Security Act to require that no benefits be paid to any individual for any month during which he or she is in prison on a felony conviction (and is not participating in an approved rehabilitation program).

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section or under section 423 of this title to any individual for any month during which said individual is confined in a jail, prison, or other penal institution or correctional facility, pursuant to his conviction of an offense which constituted a felony under applicable law, unless such individual is actively and satisfactorily participating in a rehabilitation program which has been specifically approved for such individual by a court of law, and, as determined by the Secretary, is expected to result in such individual being able to engage in substantial gainful activity upon release and within a reasonable time.

42 U.S.C. 423 (f). In July, 1981 Jensen was notified that his benefits were suspended effective October, 1980 pursuant to this statute * * * .

Jensen v. Schweiker, 709 F.2d at 1228.

The Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (1983), deleted section 423 (f) and substituted in its place section 402 (x), which suspends old age benefits in addition to disability benefits to incarcerated felons.

In 1981 Jensen filed suit against the Secretary, asserting that section 423 (f) was unconstitutional in that it violated the Fifth and Fourteenth Amendments and was an ex post facto law and bill of attainder. The district court dismissed the petition for failure to exhaust administrative remedies. This Court reversed, finding that jurisdiction existed because Jensen's challenge

to the statute was collateral to his substantive claim for disability benefits and he had presented a colorable constitutional claim. Id. at 1231. This Court specifically noted that Jensen's due process claim should be analyzed in light of Flemming v. Nestor, 363 U.S. 603 (1966), which held that termination of social security benefits to certain deportable aliens was constitutional. This Court also noted that Jensen's ex post facto claim had "some merit." Id. On remand the district court held that the statute did not violate due process, nor was the statute an ex post facto law or bill of attainder.

II. ANALYSIS

A. Due Process/Equal Protection

In analyzing Jensen's due process/ equal protection challenge that the statute creates an irrational classification by suspending disability benefits to incarcerated felons, the district court first noted that the Supreme Court has held that social security benefits are noncontractual benefits and that "the due process clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." Flemming v. Nestor, 363 U.S. U.S. at 611.

The district court correctly found that the suspension of benefits to incarcerated felons who are not participating in an approved rehabilitation program is rationally related to the Social Security Act's policy of compensating for a loss of earnings without

providing a disincentive for rehabilitation. The Third Circuit has recently held that "the exclusion of felons from disability payments while they are incarcerated and not engaged in a rehabilitation program has a perfectly rational justification in the fact that the expenses of shelter, food, clothing and medical care, which it is the purpose of disability payments to help defray, are, in the case of an incarcerated felon * * * being provided for him free of charge by the prison officials." Washington v. Secretary of Health and Services, 718 F.2d 608, 611 (3rd Cir. 1983) (citing S. Rep. No. 96-987, 96th Cong., 2nd Sess., reprinted in 1980 U.S. Code Cong. & Ad. News, 4787, 4794-95); Accord Pace v. United States, 585 F. Supp. 399, 402-03 (S.D. Tex. 1984);

Anderson v. Social Security Administration, 567 F. Supp. 410, 412 (D. Col. 1983).

As further evidence that the statute was tailored to the Act's goal of rehabilitation, the district court correctly noted that the statute did not suspend payments to an inmate who participated in an approved rehabilitation program and that benefits were not suspended to the inmate's dependents. We also agree with the district court that Congress had another permissable purpose in enacting the statute which was to avoid discipline problems which cash payments to inmates would create. See Pace v. United States, 585 F. Supp at 401 (citing Receipt of Social Security Benefits by Persons Incarcerated in Penal Institutions:

Hearings Before Subcomm. on Social Security of House Comm. on Ways and Means, 96th Cong., 2nd Sess. (1980).

B. Ex Post Facto Law/Bill of Attainder

"An ex post facto law is 'the imposition of what can fairly be designated punishment for past acts' * * * (I)f a statute is enacted to punish a class, rather than regulate a 'present situation,' then the statute may violate the ex post facto clause." Jensen v. Schweiker, 709 F.2d at 1230 (quoting De Veau Braisted, 363 U.S. 144, 146 (1960)). In order to constitute a bill of attainder, a statute must impose a punishment upon a designated person or class of persons without the benefit of trial. Nixon V. Administrator of General Services, 433 U.S. 425,

468 (1977); United States v. Brown, 381 U.S. 437, 445 (1965).

We agree with the Secretary that the statute is neither an ex post facto law nor a bill of attainder because the suspension of a noncontractual benefit cannot be considered a punishment. In Flemming v. Nestor, 363 U.S. at 617, the Supreme Court held that "the sanction (of) the mere denial of a noncontractual benefit" without more did not evidence a Congressional intent to punish. The Court noted that "(n)o affirmative disability or restraint (wa)s imposed * * *." Id. Although in this case there is some indication that Congress intended the statute in part to be punitive, Jensen v. Schweiker, 709 F.2d at 1230 (citations therein); Pace v. United States, 585 F. Supp at 401 & n.4, this court

need not invalidate the statute. Where, as here, "'the rational connection' to nonpunitive ends remains as a rationale for enacting this provision," a court should not "'reject all those alternatives * * * save that one which might require invalidation of the statute.'" Pace v. United States, 585 F. Supp at 401 (quoting Flemming v. Nestor, 363 U,S. at 621). See also Anderson v. Social Security Administrator, 567 F. Supp. at 412-13 (423 (f) remedial rather than punitive).

Accordingly, the judgement of the district court is affirmed.[3]

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[3]In his brief, Jensen argues that he is protected from suspension of his social security disability benefits because of the "grandfather" clause contained in 38 U.S.C. 3113,

A true copy.

Attest:

Clerk, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT.

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which provides for a suspension of veteran's benefits to incarcerated felons who were convicted after October 1980. However, this case deals with social security benefits, not veteran's benefits, and section 402 (x) does not contain a "grandfather clause."

APPENDIX B

Title 38 U.S.C. 3113.

Limitation on payment of compensation and dependency and indemnity compensation to persons incarcerated for conviction of a felony.

(a)(1) To the extent provided in subsection (d) of this section, any person who is entitled to compensation or to dependency and indemnity compensation and who is incarcerated in a Federal, State,or local penal institution for a period in excess of sixty days for conviction of a felony shall not be paid such compensation or dependency and indemnity compensation, for the period beginning on the sixty-first day of such incarceration and ending on the day such incarcera-ends, in an amount that exceeds--

(d) The provisions of subsection (a) of this section shall apply (1) with respect to any period of incarceration of a person for conviction of a felony committed after the date of the enactment of this section (enacted Oct. 7, 1980), and (2) with respect to any period of incarceration on or after October 1, 1980, for conviction of a felony of a person who on October 1, 1980, is incarcerated for conviction of such felony and with respect to whom the action granting an award of compensation or dependency and indemnity compensation is taken on or after such date.

APPENDIX C

Title 42 U.S.C 402 (x)

Limitation on payment to prisoners (1) Notwithstanding any other provision of this title, no monthly benefits shall be paid under this section or under section 223 (42 U.S.C.S. 423) to any individual for any month during which such individual is confined in a jail, prison, or other penal institution or correctional facility, pursuant to his conviction of an offense which constituted a felony under applicable law, unless such individual is actively and satisfactorily participating in a rehabilitation program which has been specifically approved for such individual by a court of law and, as determined by the Secretary, is expected to result

in such individual being able to engage in substantial gainful activity upon release and within a reasonable time.

APPENDIX D

Article 1, Section 9, Clause 3, of the United States Constitution.

Bill of Attainder - Ex Post Facto Laws. No Bill of Attainder or ex post facto Law shall be passed.

APPENDIX E

AMENDMENT 5

Criminal actions - Provisions concerning - Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F.

Chapter 12.1-32-01 (5) of the North Dakota Century Code.

Classification of Offenses - Penalties. Offenses are divided into seven classes, which are denominated and subject to maximum penalties, as follows:
(5) Class A misdemeanor, for which a maximum penalty of one year's imprisonment , a fine of one thousand dollars, or both, may be imposed.

APPENDIX G.

Chapter 12.1-32-02 (1.)(c)(1) of the North Dakota Century Code.

Sentencing alternatives - Credit for time in custody - Diagnostic testing.

1. Every person convicted of an offense who is sentenced by the court shall be sentenced to one or a combination of the following alternatives, unless the sentencing alternatives are otherwise specifically provided in the statute defining the offense:

c. A term of imprisonment, including intermittent imprisonment:

(1) In a state correctional facility, a regional corrections center, a county jail, or in the state farm, in accordance with section 12-51-07, if convicted of a felony or a Class A misdemeanor.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-221

In the Supreme Court of the United States

OCTOBER TERM, 1985

HERBERT O. JENSEN, PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner contends that 42 U.S.C. (Supp. I) 402(x)(1), which suspends payment of social security benefits to incarcerated felons who are not participating in approved rehabilitation programs, constitutes a bill of attainder and ex post facto law under Article I, Section 9, Clause 3 of the Constitution and violates his due process and equal protection rights under the Fifth Amendment to the Constitution.

1. In 1974, after two heart attacks, petitioner began receiving social security disability benefits under 42 U.S.C. 423(a)(1). In 1977, petitioner was convicted of second degree murder and was sentenced to serve 30 years in the North Dakota State Penitentiary, where he is still incarcerated. In 1980, Congress amended the Social Security Act to require that no disability benefits be paid to any individual "for any month during which such individual is confined

in a jail, prison, or other penal institution or correctional facility, pursuant to his conviction of an offense which constituted a felony under applicable law, unless such individual is actively and satisfactorily participating in [an approved] rehabilitation program." Pub. L. No. 94-473, § 5(c), 94 Stat. 2265 (codified at 42 U.S.C. 423(f)(1) (repealed 1983)). In 1983, Congress reenacted this provision as Section 402(x)(1) of Title 42, and expanded it to cover recipients of old age benefits in addition to disability benefits. Pub. L. No. 98-21, § 339, 97 Stat. 133.

After being notified that his disability benefits were being suspended as of the effective date of Pub. L. No. 94-473 during his incarceration, petitioner filed the instant action in the United States District Court for the District of North Dakota, contending that the statute violated his constitutional rights of due process and equal protection and constituted an ex post facto law and bill of attainder. The district court dismissed the complaint for petitioner's failure to exhaust his administrative remedies, but the court of appeals reversed and remanded for further proceedings, finding that petitioner's challenge to the statute was collateral to his substantive claim of entitlement and presented a colorable constitutional challenge within the meaning of this Court's decision in *Mathews* v. *Eldridge,* 424 U.S. 319 (1976). *Jensen* v. *Schweiker,* 709 F.2d 1227, 1229-1231 (8th Cir. 1983).

On remand, the district court determined that petitioner's constitutional claims were without merit (Pet. 6-7; Pet. App. 5a). In a per curiam opinion (Pet. App. 1a-12a), the court of appeals affirmed. The court evaluated petitioner's due process and equal protection claims by determining whether " 'the statute manifests a patently arbitrary classification, utterly lacking in rational justification' "(*id.* at 6a, quoting *Flemming* v. *Nestor,* 363 U.S. 603, 611 (1960)). The court found that "the suspension of benefits to

incarcerated felons who are not participating in an approved rehabilitation program is rationally related to the Social Security Act's policy of compensating for a loss of earnings without providing a disincentive for rehabilitation" (Pet. App. 6a-7a); the court also concluded that "Congress had another permissible purpose in enacting the statute which was to avoid discipline problems which cash payments to inmates would create" (*id.* at 8a (citations omitted)).

Next, the court of appeals dismissed petitioner's ex post facto and bill of attainder claims (Pet. App. 9a-11a). Again relying on this Court's decision in *Flemming*, 363 U.S. at 617, the court of appeals held that "the suspension of a noncontractual benefit [such as petitioner's disability benefits] cannot be considered a punishment" (Pet. App. 10a). Although suggesting that there was "some indication" that Congress may have been motivated in part by punitive aims, the court concluded that Congress also had rational nonpunitive reasons for enacting this provision and that it would not " ' "reject all those alternatives * * * save that one which might require invalidation of the statute" ' " (*id.* at 11a, quoting *Pace* v. *United States*, 585 F. Supp. 399, 401 (S.D. Tex. 1984), and *Flemming*, 363 U.S. at 621)).

2. The opinion of the court of appeals is plainly correct and does not warrant further review by this Court.

Petitioner does not appear to argue that the court of appeals' decision is inconsistent with the decisions of this Court or any other court of appeals. It is not: it follows the decisions of this Court in *Flemming* v. *Nestor*, *supra*, and *Schweiker* v. *Wilson*, 450 U.S. 221 (1981), and is in accord with the decisions of every lower court that has considered similar challenges by prisoners to the same statute and its predecessor. *Jones* v. *Heckler*, No. 84-1598 (10th Cir. Oct. 1, 1985); *Buccheri-Bianca* v. *Heckler*, 768 F.2d 1152 (10th

Cir. 1985); *Washington* v. *Secretary of HHS,* 718 F.2d 608 (3d Cir. 1983); *Pace* v. *United States,* 585 F. Supp. 399 (S.D. Tex. 1984); *Hopper* v. *Schweiker,* 596 F. Supp. 689 (M.D. Tenn. 1984).

As the court of appeals correctly recognized (Pet. App. 9a), the ex post facto and bill of attainder clauses of the Constitution were designed to prohibit certain legislatively inflicted (as opposed to judicially determined) punishments. To constitute an ex post facto law, a statute must " 'impose[] a punishment for an act which was not punishable at the time it was committed; or [must] impose[] additional punishment to that then prescribed.' " *Weaver* v. *Graham,* 450 U.S. 24, 28 (1981), quoting *Cummings* v. *Missouri,* 71 U.S. (4 Wall.) 277, 325-326 (1867). Similarly, a bill of attainder is a law "that legislatively determines guilt and inflicts punishment * * * without provision of the protections of a judicial trial." *Nixon* v. *Administrator of General Services,* 433 U.S. 425, 468-469 (1977).

The critical question here on the ex post facto and bill of attainder claims, then, is whether the legislation imposes "punishment." See *Flemming* v. *Nestor,* 363 U.S. at 613. In *Flemming,* this Court rejected the contention that Section 202(n) of the Social Security Act (42 U.S.C. 402(n)), which provides for termination of social security benefits to certain deported aliens, constituted an ex post facto law or bill of attainder. The Court said: "Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected." 363 U.S. at 614. In other words, if " 'the restriction of the individual comes about as a relevant incident to a regulation of a present situation,' " it is not punishment. *Ibid.* (quoting *De Veau* v. *Braisted,* 363 U.S. 144, 160

(1960) (plurality opinion)). The statute at issue in *Flemming*, this Court pointed out, did not impose an "affirmative disability or restraint" but rather constituted "the mere denial of a noncontractual governmental benefit." 363 U.S. at 617. In such a situation, "only the clearest proof [of punitive intent] could suffice to establish the unconstitutionality of a statute * * *." *Ibid.*

The present case is directly analogous. As the court of appeals recognized, Congress's motives for enacting this statute were in fact to deny payments to those who no longer needed them and to ameliorate the disciplinary problems such payments to prisoners created—not to punish. See S. Rep. 96-987, 96th Cong., 2d Sess. 8 (1980); *Receipt of Social Security Benefits by Persons Incarcerated in Penal Institutions: Hearings Before Subcomm. on Social Security of House Comm. on Ways and Means*, 96th Cong., 2d Sess. 25, 64, 68, 75 (1980); *Washington* v. *Secretary of HHS*, 718 F.2d at 610-611; *Pace* v. *United States*, 585 F. Supp. at 401.[1]

Petitioner's due process and equal protection claims are equally ill-founded.[2] As set forth in *Flemming*, the applicable test for measuring these claims is whether "the statute

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[1]The court of appeals said it found "some indication" that Congress *in part* intended the statute to be punitive (Pet. App. 10a). Assuming, arguendo, such an indication, the limited legislative history in this regard falls far short of the "unmistakable evidence of punitive intent which * * * is required before a Congressional enactment of this kind may be struck down." *Flemming*, 363 U.S. at 619. In any event, where a rational nonpunitive justification exists—and certainly where, as here, it is explicitly embodied in the legislative history—this Court is not required to "reject all those alternatives which imaginativeness can bring to mind, save that one which might require the invalidation of the statute." *Id.* at 621.

[2]Petitioner cites manifold examples of what he contends to be unequal treatment between himself and those in other allegedly relevant classes of recipients of public (and private) benefits (Pet. 13-22). Without parsing the questionable relevance (and accuracy) of these

manifests a patently arbitrary classification, utterly lacking in rational justification." 363 U.S. at 611. As just discussed, the legislative history of this statute amply demonstrates congressional concern that a basic purpose of the social security program—that is, to provide a continuing source of income to those whose earnings are cut off as a result of severe disability—was not being served by payments to individuals being maintained at public expense in prison; the legislative history also demonstrates Congress's concern that cash payments to prisoners were creating disciplinary problems within prisons. Either of these concerns constitutes a rational justification for the statute. See, *e.g.*, *Richardson* v. *Belcher*, 404 U.S. 78, 82-84 (1971).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

OCTOBER 1985

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examples, we note simply that a classification " 'does not offend the Constitution simply because [it] "is not made with mathematical nicety or because in practice it results in some inequality" ' " (*Idaho Department of Employment* v. *Smith*, 434 U.S. 100, 101 (1977), quoting *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970), and *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)) and that "it is, of course, constitutionally irrelevant * * * that the section does not extend to all to whom the postulated rationale [of the statute] might in logic apply." *Flemming*, 363 U.S. at 612 (footnote omitted). See also *Schweiker* v. *Wilson*, 450 U.S. 221 (1981).